Supreme Court, U.S.
FILED

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No.

In the

Supreme Court of the United States

OCTOBER 2001 TERM

ITNX,

Petitioner

v.

ALPHA BUSINESS GROUP, INC, and NORMA J. HURT,

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Dated: November 1, 2001

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QUESTIONS PRESENTED

1. Does a Circuit Court of Appeal violate due process when it affirms on a ground never raised or relied upon by the parties or the lower courts?

2. Does a bankruptcy court violate due process by ordering the sale of real property titled in the name of a non-creditor merely because the debtor claims an interest in that property?

3. Does a bankruptcy court have subject matter jurisdiction to order the sale of real property titled in the name of a non-creditor merely because the debtor claims an interest in that property?

4. Does 11 U.S.C. § 363(b) authorizes the sale of property in which a party other than the debtor has an interest, without the debtor meeting the requirements of 11 U.S.C. § 363(f) as the Ninth Circuit has held, or must those requirements be met as the Second, Fourth and Eighth Circuits have held?

5. Is a Federal Court judgment binding on an entity without proof that it was properly represented and had notice and an opportunity to be heard in the prior proceeding?

PARTIES TO THE PROCEEDINGS BELOW

Petitioner ITNX ("ITNX") appeared by counsel as the objectant in connection with the application of the debtor, Norma J. Hurt ("Hurt"), brought in the United States Bankruptcy Court for the District of Arizona for permission to sell six lots of real property located in Creede, Colorado and titled in the name of ITNX. Hurt, the debtor, appeared by counsel in the same court as the movant in connection with the application to sell the properties free and clear of all interests. The same two parties appeared by counsel before the Bankruptcy Appellate Panel for the Ninth Circuit and the United States Court of Appeals for the Ninth Circuit.

CORPORATE DISCLOSURE STATEMENT

Neither the Petitioner, nor any of the other parties below, is a publicly traded corporation.

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OPINIONS BELOW

The opinion of the Bankruptcy Court of the District of Arizona is not reported. The opinion of the Bankruptcy Appellate Panel for the Ninth Circuit is not reported. The opinion of the United States Court of Appeals for the Ninth Circuit is not reported. The text of all three opinions are contained in the appendix, as are the orders granting an extension to file a petition for rehearing with suggestion for rehearing en banc and denying the petition for rehearing with suggestion for rehearing en banc.

JURISDICTION

The Bankruptcy Court did not have jurisdiction over the proceeding pursuant to 28 U.S.C. § 157(b)(2)(N) and 28 U.S.C. § 157(c)(2), although Hurt will claim that the Bankruptcy Court did have jurisdiction under 28 U.S.C. § 157(b)(2)(O). The Bankruptcy Panel for the Ninth Circuit had jurisdiction over the appeal from the final order of the Bankruptcy Court pursuant to 28 U.S.C. § 158(b). The BAP order was filed on September 13, 1999, and ITNX filed its notice of appeal to the United States Court of Appeals for the Ninth Circuit on November 30, 1999 within thirty days of the denial of ITNX's timely motion for rehearing. The United States Court of Appeals for the Ninth Circuit had jurisdiction to hear the timely appeal from the order of the Bankruptcy Appellate Panel pursuant to 28 U.S.C. § 158(d). The order of the Ninth Circuit was entered on June 5, 2001. ITNX filed a timely petition for rehearing with suggestion for rehearing en banc (after receiving an extension from the Ninth Circuit of the 14 day time limit). The petition for rehearing was denied on August 3, 2001. This petition is timely as it is being filed on or before November 1, 2001, within ninety days of the order denying the petition for rehearing. Supreme Court Rules 13.1 and 13.3. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution provides in relevant part:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

11 U.S.C. § 363 states in pertinent part:

> (a) In this section, "cash collateral" means cash, negotiable instruments, documents of title, securities, deposit accounts, or other cash equivalents whenever acquired in which the estate and an entity other than the estate have an interest and includes the proceeds, products, offspring, rents, or profits of property and the fees, charges, accounts or other payments for the use or occupancy of rooms and other public facilities in hotels, motels, or other lodging properties subject to a security interest as provided in section 552(b) of this title, whether existing before or after the commencement of a case under this title.

(b)(1) The trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate.

(2) If notification is required under subsection (a) of section 7A of the Clayton Act in the case of a transaction under this subsection, then--

(A) notwithstanding subsection (a) of such section, the notification required by such subsection to be given by the debtor shall be given by the trustee; and

(B) notwithstanding subsection (b) of such section, the required waiting period shall end on the 15th day after the date of the receipt, by the Federal Trade Commission and the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice, of the notification required under such subsection (a), unless such waiting period is extended--

(i) pursuant to subsection (e)(2) of such section, in the same manner as such subsection (e)(2) applies to a cash tender offer;

(ii) pursuant to subsection (g)(2) of such section; or

(iii) by the court after notice and a hearing. . . .

(f) The trustee may sell property under subsection (b) or (c) of this section free and clear of any interest in such property of an entity other than the estate, only if--

(1) applicable nonbankruptcy law permits sale of such property free and clear of such interest;

(2) such entity consents;

(3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;

(4) such interest is in bona fide dispute; or

(5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest . . .

(h) Notwithstanding subsection (f) of this section, the trustee may sell both the estate's interest, under subsection (b) or (c) of this section, and the interest of any co-owner in property in which the debtor had, at the time of the commencement of the case, an undivided interest as a tenant in common, joint tenant, or tenant by the entirety, only if--

(1) partition in kind of such property among the estate and such co-owners is impracticable;

(2) sale of the estate's undivided interest in such property would realize significantly less for the estate than sale of such property free of the interests of such co-owners;

(3) the benefit to the estate of a sale of such property free of the interests of co-owners outweighs the detriment, if any, to such co-owners; and

(4) such property is not used in the production, transmission, or distribution, for sale, of electric energy or of natural or synthetic gas for heat, light, or power

(i) Before the consummation of a sale of property to which subsection (g) or

(h) of this section applies, or of property of the estate that was community property of the

debtor and the debtor's spouse immediately before the commencement of the case, the debtor's spouse, or a co-owner of such property, as the case may be, may purchase such property at the price at which such sale is to be consummated . . .

STATEMENT OF THE CASE

According to the records of the County Clerk of Mineral County, Colorado, ITNX is the title owner of record of six parcels of real property located in that locale. In 1985, an involuntary petition in bankruptcy was filed in the United States Bankruptcy Court for the District of Arizona against Hurt. It was thereafter converted into a voluntary bankruptcy proceeding. ITNX was never listed as a creditor in the proceeding.

On June 24, 1996, Norma Hurt, filed an application in the Bankruptcy Court to sell the subject property located in Creede, Colorado. ITNX immediately filed an objection to the sale. As conceded by Hurt, ITNX has a fee interest in the property in the regular chain of title. ITNX obtained this interest in 1981 - almost twenty years prior to Hurt's filing of the present application. Norma Hurt's ex-husband, Milton Pace, acquired the Colorado property by patent issued by Colorado on September 17, 1965. After Hurt and Pace divorced, Pace conveyed the Colorado property to Hurt by quit claim deeds in 1978 in accordance with the divorce decree. In 1979, Robertson Wood Products, Inc. obtained title to the Colorado property by Sheriff's Sale for execution of a $47,763.25 default judgment against Milton Pace. In 1981, Robertson conveyed this interest to ITNX, Inc. In 1989, ITNX granted Alpha Business Group, Inc. a beneficial interest in the property by means of a Deed of Trust.

At no time did Hurt file an action to set aside ITNX's fee interest or the 1979 Sheriff's Sale under Colorado law. Hurt did commence a proceeding to test the attachment of her Arizona property on the basis of Robertson's default judgment against her ex-husband. The Arizona judgment that resulted from this proceeding did not address the validity of the 1979 Sheriff's Sale or the 1981 conveyance to ITNX.

Notwithstanding ITNX's ownership of the property, Hurt contends that the property is part of the debtor's estate and that she

has an equitable interest in the property arising from the 1978 Divorce Decree awarding her the property and a 1990 settlement agreement between her and various creditors (none of which were ITNX) awarding her the property. In 1990, Hurt and her creditors entered into a Settlement Agreement purportedly giving Hurt title to the Colorado property. ITNX was not a party to the settlement agreement and was never noticed or scheduled as a creditor, despite its recorded fee interest in the property.

On August 9, 1996, the bankruptcy court approved the sale of ITNX's property over its objection, and then confirmed the sale on September 30, 1996 under 11 U.S.C. § 363(f) on the grounds that the title to the property was in bona fide dispute. The Colorado properties were sold to Gary Clark as trustee for Fidelity Title and Trust for the sum of $16,000. The bankruptcy court then impounded the proceeds of the sale until further order of the court.

ITNX appealed the bankruptcy court's order. In an unpublished opinion, the BAP concluded that the court properly authorized sale of the property under 11 U.S.C. §363(f)(4) because a bona fide dispute existed between Hurt and ITNX regarding ownership of the property. (A. 19-23). Under the BAP's interpretation of subsection (f)(4), a bankruptcy court has unbridled authority to extinguish a third-party's vested contract right in real property owned in fee. Under this "reasoning," although ITNX holds a fee interest in the property by means of the regular chain of title in Colorado, the bankruptcy court could sell that property even though ITNX was neither a creditor nor a party to Hurt's bankruptcy proceeding. ITNX appealed the order of the BAP to the United States Court of Appeals for the Ninth Circuit. In an unpublished opinion, the Ninth Circuit affirmed the order of the BAP. (A. 28-33) The Ninth Circuit also denied ITNX's petition for a rehearing and suggestion for a rehearing en banc. (A. 35-36).

REASONS FOR GRANTING THE PETITION

The petition should be granted so that this Court may decide important issues concerning the authority of the Courts of Appeals to decide a matter on a ground never raised by any party, the effect of a judgment against a non-party, as well as the authority of a bankruptcy court to sell property titled in the name of an entity that is not a creditor.

These issues are of nation-wide importance. The issue of whether an entity that is not a party to a proceeding may be bound by the judgment arises in numerous contexts. It is not limited to bankruptcy proceedings. The issue of whether a bankruptcy court has the authority to authorize the sale of property titled in the name of an entity that was never named as a creditor in the bankruptcy goes to the very essence of the bankruptcy court's powers. The resolution of this issue is not only of interest to the litigants in the case at bar, but to debtors and creditors throughout the country.

POINT I **THE PETITION SHOULD BE GRANTED BECAUSE THE NINTH CIRCUIT'S DECISION TO AFFIRM THE BAP'S ORDER ON A GROUND NOT RAISED OR ADDRESSED IN THE COURT BELOW CONFLICTS WITH THE REQUIREMENTS OF DUE PROCESS.**

Hurt argued at all times below that ITNX had an interest in the properties, but that the interest was in bona fide dispute, permitting the properties to be sold free and clear under 11 U.S.C. § 363(f). The Ninth Circuit, however, held that Hurt had sole title to the properties, and that ITNX had no interest. (A. 33). By deciding the case on grounds never argued by Hurt and never discussed by the two lower courts which heard the matter, the Ninth Circuit denied ITNX the chance to present relevant evidence on the issue and violated its due process rights. For example, the sole basis for the panel's holding that ITNX lacked any interest in the subject property was that the settlement and judgment in adversary proceeding 87-199, to which ITNX was not a party, waived ITNX's claim to the property. (A. 31-33). Hurt never argued this in any of the lower courts. In fact, a thorough reading of the BAP opinion shows that Hurt conceded that ITNX had an interest in the property. (A. 21-23).

Had Hurt argued that ITNX lacked any interest in the Colorado properties before the bankruptcy court, ITNX would have had the opportunity to present evidence that (1) ITNX was not a party to the proceeding or settlement in adversary proceeding 87-199, and (2) Andrew Spain did not sign the stipulation, and if he did sign it, he signed it in his individual capacity and not as an officer of ITNX.

This Court has held that, as a general rule, the Courts of Appeals will not entertain arguments raised for the first time on appeal. *Singleton v. Wulff*, 428 U.S. 106, 120 (1976). The Court stated there may be some exceptions, such as where the proper

resolution is beyond any doubt, or where "injustice might otherwise result." *Id.* Those exceptions are not applicable here. The panel opinion violated this rule of law.

In addition, numerous decisions of the Circuit Courts of Appeals, including prior decisions of the Ninth Circuit, have held that appellate courts will not address theories not raised in the lower court. In *Alaska Airlines, Inc. v. United Airlines, Inc.*, 948 F.2d 536, 541 (9th Cir. 1991), *cert. den.*, 503 U.S. 977 (1992), the plaintiff brought an action under Section 2 of the Sherman Antitrust Act (15 U.S.C. § 2). The Court held that it would therefore not address the viability of any potential claims under Section 1 of the Act, because it would not consider theories not raised either in the court below or to the Court of Appeals. *Id.*, at 541 fn. 8. Part of the Court's reasoning as to why it would not do so is that Sections 1 and 2 of the Sherman Act were designed to remedy distinct problems, and therefore required different proof. *Id.* at 540. *See also Rauh v. Noonan*, 119 F.3d 46, 51 (1st Cir. 1997) (party may not raise new arguments for the first time on appeal); *Cruz v. Coach Stores,* Inc., 202 F.3d 560, 572 n. 8 (2d Cir. 2000) (issue not raised below or briefed on appeal is waived); *Holland v. Big River Minerals Corp.*, 181 F.3d 597, 605-607 (4th Cir. 1999), *cert den.*, 528 U.S. 1117 (2000) (court will address issues not raised in the court below only under exceptional circumstances); *United States v. Hughes*, 33 F.3d 1248, 1252 n.4 (10th Cir. 1994).

The Ninth Circuit in this case went beyond addressing an argument raised for the first time on appeal. It addressed an argument that Hurt *never* raised, even on appeal to that court. By doing so it denied ITNX the ability to present relevant evidence.

As in *Alaska Airlines*, 11 U.S.C. §§ 363(b) and 363(f)(4) address different problems. Section 363(b) concerns situations where no other party claims an interest in the property other than the debtor. In contrast, section 363(f) addresses situations where another party does claim an interest in the property and the debtor is attempting to sell the property free and clear of that alleged interest.

The proof required is different. By holding that Section 363(b) authorized the sale of the properties, the Court essentially held that ITNX had no interest in the property, which was not what was argued by Hurt. By deciding the case on a theory not previously raised, ITNX was precluded from developing a sufficient record on that issue. Had Hurt tried the case on the theory that ITNX had no interest as a result of the judgment in adversary proceeding 87-199, rather than on the theory that ITNX did have an interest but that interest was in dispute, ITNX would have presented different evidence in the Bankruptcy Court.

In the present matter, the Ninth Circuit should not have decided the matter based upon a theory never presented, which was in fact directly contrary to the position Hurt had taken at each stage of the litigation. ITNX did not have the opportunity to present relevant evidence with respect to the theory raised, for the first time, by the Ninth Circuit panel.

The Ninth Circuit relied exclusively on its belief that Andrew Spain signed the settlement agreement in Bankruptcy Court adversary proceeding 87-199, as president of ITNX. (A. 31). However, had that theory been raised before, ITNX would have submitted evidence that Spain never signed the agreement, and certainly did not sign the agreement in his capacity as president of ITNX. In fact, these issues were tried on remand to the bankruptcy court in the related case of BFOW, Inc. v. Hurt, NO. 85-3802-PHX-RGM, ADV. 95-00913. There, it is alleged that Milton Pace, the debtor's ex-husband, signed Spain's name. ITNX did not present this evidence in the present proceeding because Hurt never argued that ITNX did not have title to the property. The Ninth Circuit deprived ITNX of due process by deciding a matter on a grounds that was not in the record.

It is well-settled that the core requirements of the due process clause are notice and an opportunity to be heard. *Mullane v Central Hanover Bank & Trust, Co.*, 339 U.S. 306, 313 (1950). *See also, Nelson v. Adams USA, Inc.*, 529 U.S. 460, 472 (2000) (while a

pleading may be amended post-judgment to add an additional party, that party must be given the opportunity to defend on the merits; the judgment may not simultaneously amended to impose instantaneous liability on the new party). A party is deprived of a meaningful opportunity to be heard if, as here, a court decides a matter on a ground never raised by any party.

POINT II THE PETITION SHOULD BE GRANTED BECAUSE THE NINTH CIRCUIT'S HOLDING THAT 11 U.S.C. § 363 AUTHORIZES THE SALE OF PROPERTY TITLED IN THE NAME OF A NON-CREDITOR MERELY BECAUSE THE DEBTOR CLAIMS THAT TITLE IS IN DISPUTE IS INCONSISTENT WITH THE LIMITED JURISDICTION CONGRESS GRANTED BANKRUPTCY COURT JUDGES.

11 U.S.C. § 363(b) permits the sale of property of the estate. Because the Colorado property was not property of the Estate at the time the petition was filed, and because, as is argued below in Point IV ITNX cannot be bound by the judgment in adversary proceeding 87-199, the property was never property of the Estate.

A. The Court lacks the authority to sell property that is not part of the estate.

All parties concede that Hurt did not have any equitable or legal interest in the Colorado property at the time the bankruptcy petition was filed in 1985. In fact, the Ninth Circuit, in its memorandum opinion, quotes the language of 11 U.S.C. § 541(a)(1) that, "'Property of the estate' is defined as, 'All legal or equitable interests of the debtor in property as of the commencement of the case,'" (A. 30) then goes on to hold that Hurt did not obtain any alleged interest in the properties until April 1990, over four years after the petition was filed.

The Bankruptcy Code is designed to advance competing goals - to provide debtors with "fresh starts" while at the same time providing creditors with some avenue of repayment and to prevent the fraudulent debtor from escaping the consequences of his or her fraud. *Cohen v. DeLaCruz*, 523 U.S. 213, 222 (1998) (exceptions to discharge evince legislative determination that creditor's interest in receiving full payment in those categories of cases outweighs the debtor's interest in a fresh start). By permitting the debtor in

possession to sell property that was not part of the estate, the Ninth Circuit pushed the balance too far in favor of the debtor, by permitting the debtor to obtain assets that were not part of the estate at the time the petition was filed.

B. Bankruptcy Courts lack the authority to sell property titled in the name of a non-creditor.

The bankruptcy court lacked authority to sell ITNX's property pursuant to section 363(f)(4) because ITNX was not a creditor in the proceeding. *See Northern Pipeline Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982). Pursuant to *Marathon*, "Congress may not vest in a non-Article III court (such as a bankruptcy court) the power to adjudicate, render final judgment, and issue binding orders in a traditional contract action arising under state law, without consent of the litigants, and subject only to ordinary appellate review." *Thomas v. Union Carbide Agricultural Products*, 473 U.S. 568, 584 (1985). A proceeding that does not invoke a substantive right created by the federal bankruptcy law and that can exist outside the bankruptcy is not a core proceeding. *In Matter of Wood*, 825 F.2d 90, 96-97 (5th Cir. 1987). Here, ITNX was not a party to Hurt's bankruptcy action, and the bankruptcy court lacked the authority to sell ITNX's property. Hurt claims an equitable interest pursuant to an Arizona Divorce Decree and Colorado law purportedly voiding the Colorado Sheriff's Sale and conveyance to ITNX. If she is correct, she would have actions under state law, albeit time-barred. Accordingly, the trustee's attempt to capture this property for the estate is a non-core proceeding over which the bankruptcy court lacked jurisdiction to enter dispositive orders pursuant to 28 U.S.C. § 157(c)(2).

POINT III THE PETITION SHOULD BE GRANTED SO THAT THIS COURT MAY RESOLVE A CONFLICT AS TO WHETHER 11 U.S.C. § 363(B) AUTHORIZES THE SALE OF PROPERTY IN WHICH IT IS CONCEDED THAT ANOTHER PARTY OTHER THAN THE DEBTOR HAS AN INTEREST, WITHOUT FIRST SATISFYING ANY OF THE PROVISIONS OF 11 U.S.C. § 363(F).

The Ninth Circuit relied solely on 11 U.S.C. § 363 (b) in authorizing the sale, and specifically held that it was not necessary to find that one of the prerequisites of 11 U.S.C. § 363(f) were satisfied before the sale could be authorized. (A. 32-33). However, even Hurt conceded that ITNX had an interest in the property - it had acquired title over twenty years ago in a Sheriff's sale that remains unchallenged to this day.

The Second, Fourth and Eighth Circuits have held that the bankruptcy court may only order or authorize the sale of property in which a third party has an interest if certain conditions are met, namely one of the conditions listed in 11 U.S.C. § 363(f). *MacArthur Co. v. Johns-Manville Corp.*, 837 F.2d 89, 93 *cert den.*, 488 U.S. 868 (1988); *Hutchinson v. McGee*, 5 F.3d 750, 755 (4th Cir. 1993); *Lindsey v. Ipock*, 732 F.2d 619, 622 (8th Cir. 1984), *cert den. sub nom. Cryts v. French*, 469 U.S. 881 (1984) ("Before authorizing the trustee to sell the [property], the bankruptcy court was to 'carefully consider the requirements of section 363(f) and the duty under the Code to protect the property interests of third parties.'"). In conflict with these decisions, the Ninth Circuit in the present case held that Section 363(b) authorizes the sale of Colorado properties without demonstrating the existence of one of the bases under Section 363(f), notwithstanding the fact that all parties conceded that ITNX had an interest in these properties. The Ninth Circuit therefore approved the sale of property in which a non-debtor had title, exceeding the jurisdiction of the bankruptcy court.

POINT IV **THE PETITION SHOULD BE GRANTED BECAUSE THE NINTH CIRCUIT'S DECISION TO HOLD AN ENTITY WHO WAS NOT BEFORE THE COURT BOUND BY A JUDGMENT ENTERED IN A PRIOR PROCEEDING CONFLICTS WITH THE RULE IN OTHER CIRCUIT COURTS OF APPEALS.**

The sole basis for the Ninth Circuit's conclusion that the Colorado property was exclusively the property of the bankrupt debtor and that ITNX had no interest in the property was the 1990 settlement agreement in adversary proceeding 87-199. (A. 31). But ITNX was not a party to that adversary proceeding, and is not bound by the consent judgment entered in that case.

A. The petition should be granted to resolve a split between the Ninth Circuit in this case and the holding of this Court and the other Courts of Appeals as to the propriety of using the concept of "virtual representation" to bind a non-party to a prior judgment.

Although the Ninth Circuit's brief memorandum opinion does not explicitly state its reasoning for concluding that ITNX was bound by the judgment in 87-199 despite the fact that it was not before the bankruptcy court in that proceeding, it is implied that the Ninth Circuit held that Andrew B. Spain, ITNX's president, in his individual capacity only, who was an alleged signatory to the settlement in 87-199, "virtually represented" ITNX so that ITNX could be bound by the judgment. The Ninth Circuit stated that "Spain thus waived ITNX's clam to the Colorado property." (A. 31). This concept that an individual binds a corporation when he signs in an individual capacity and is not a corporate officer at that time is at odds with the holdings of this Court, as well as the holdings of various other Circuit Courts of Appeal. However, the Eighth and Eleventh Circuits have apparently accepted the concept and permit the broad use of "virtual representation," as did the Ninth Circuit in the case at bar. This Court should grant the petition to resolve the conflict.

The closely tailored application of the doctrine of "virtual representation" comports more closely with the due process demands identified by this Court in *Richards v. Jefferson County, Alabama*, 517 U.S. 793 (1996). The Court in *Richards*, citing *Hansberry v. Lee*, 311 U.S. 32 (1940), held that the due process clause of the Fourteenth Amendment precluded a court from binding a litigant to a judgment rendered in an earlier litigation to which it was not a party unless the nonparty was adequately represented by a party. *See also, Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 845 (1999) (in order to ensure that a person is not bound by a settlement to which he has not a party, a class action settlement based upon a limited fund theory is only permissible if the fund is limited

independently of an agreement by the parties, and the class must include al those with unsatisfied claims).

In *Richards*, the petitioners represented a class of all nonfederal employees subject to an occupation tax imposed upon them by Jefferson County, Alabama. The County moved for summary judgment, holding that the petitioner's action was barred by prior consolidated actions brought by the City of Birmingham, Alabama and three county taxpayers in which the Supreme Court of Alabama upheld the validity of the tax. *Richards* at 795. The Supreme Court of Alabama agreed, holding that the tax payers in the prior action adequately represented the petitioner's class. This Court disagreed, holding that the application of claim or issue preclusion under the facts of that case would violate the due process clause of the Fourteenth Amendment. This Court emphasized two factors in determining that the petitioners had been adequately represented, (1) the petitioners had not received any notice of the prior proceeding, and (2) the plaintiffs in the prior proceeding had not purported to act in any class-wide representative capacity. *Richards* at 800-802. Here, too, ITNX did not receive any notice of adversary proceeding 87-199, and none of the participants in 87-199 purported to represent any class interests.

The Eighth Circuit has adopted a broad interpretation of the rule of virtual representation, whereby a judgment in a prior proceeding may bind a nonparty if there exists a substantial relationship between the party and the nonparty, such that the party adequately represented the interests of the nonparty. *Tyus v. Schoemehl*, 93 F.3d 449, 454 (8th Cir. 1996), *cert den. sub nom., Miller v. Schoemehl*, 520 U.S. 1166 (1997). In approving of this concept, the Eighth Circuit focused on the need for judicial economy, *Id.*, 93 F.3d at 455. The Eleventh Circuit has also approved of the broad use of virtual representation for claim preclusion purposes. In *National Ass'n for the Advancement of Colored People v. Hunt*, 891 F.2d 1555, 1561 (11th Cir. 1990), the Eleventh Circuit held that members of the state legislature who filed a federal action alleging that the flying of the Confederate Flag over the Alabama Capital

violated the Flag Code (36 U.S.C. §175) and their Constitutional rights were precluded by a state court judgment in a suit brought by another state legislator asserting similar claims. The Court held that the plaintiffs in the state court action was so closely aligned with the NAACP's interests that it was their virtual representative. *NAACP v. Hunt* at 1561.

In contrast the Seventh Circuit has rejected the use of the "virtual representation" test, and has focused instead on the factual question of whether there is a sufficient link between the party and the nonparty which would justify binding the nonparty to the result reached in the first litigation. *Tice v. American Airlines, Inc*, 162 F.3d 966, 971 (7th Cir.1998), *cert. den.*, 527 U.S. 1036 (1999). According to the Seventh Circuit, this closely tempered version comports more closely with *Richards v. Jefferson County, Alabama*, 517 U.S. 793 (1996).

The Sixth Circuit has also taken a more narrow view of the "virtual representation" doctrine, holding that it normally only arises when the nonparty expressly agrees to be bound by the representation of the party. *Becherer v. Merrill Lynch, Pierce, Fenner and Smith, Inc.*, 193 F.3d 415, 423 (6th Cir. 1999). In the absence of an express agreement to be bound, such an agreement should only be inferred upon the *plainest circumstances.*" *Id.* at 423. (emphasis in original). The Ninth Circuit has held that *Richards* forecloses the use of the "similar interests" test advanced by the Eleventh Circuit in *NAACP v. Hunt*, 891 F.2d 1555 (11th Cir. 1990). *Green v. City of Tucson*, 255 F.3d 1086, 1101 (9th Cir. 2001). There is, therefore, an internal conflict between the various panels of the Ninth Circuit, and a circuit split on this important issue.

The Ninth Circuit's holding in this case is at odds with the holdings of the Seventh and Sixth Circuits, as well as its own opinion in *Green* which limits the appellate courts in their use of the virtual representation doctrine to circumstances where minimum protections of due process are satisfied.

B. The Ninth Circuit's use of a broad virtual representation rule in the present case is particularly unfair in view of the fact that no hearing was ever held concerning the interrelationship between Andrew Spain and the shareholders of ITNX.

The Ninth Circuit's adoption of the broader theory in this case, binding ITNX to a judgment to which it was not a party, was particularly inappropriate in light of the fact that none of the lower courts conducted a hearing to evaluate the relationship between Andrew Spain and ITNX to see if ITNX's interests were adequately represented in adversary proceeding 87-199. Because to use of issue and claim preclusion against a nonparty raises due process concerns, *Richards* at 797, it was inappropriate to make this finding *sua sponte* at the Circuit Court level as no hearing was conducted prior to holding that the non-party's interests were adequately protected in the prior proceeding.

CONCLUSION

For the foregoing reasons, ITNX requests that this Court grant the Petition for Writ of Certiorari and grant it such other and further relief to which it may be entitled.

Dated: November 1, 2001

Respectfully Submitted,

By: Jonathan C. Scott

SCOTT & SCOTT, LLP, by
Jonathan C. Scott, Esq.
999 Walt Whitman Road
Melville, NY 11747
(631) 271-644
Attorneys for Petitioner

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF ARIZONA

In re:	)	Chapter 11
	)	Case No. 85-3802-PHX-JMM
	)	ORDER RE: APPLICATION
NORMA J. HURT fka	)	FOR SALE OF REAL
NORMA J. PACE,	)	PROPERTY
	)	
Debtor.)		(Tract 32, Block 42, Lots
	)	1,2,3,4,5 & 6, Creede, Mineral
	)	County, Colorado)
_____	)	

The hearing on the debtor's application for sale of real property came on for regularly on August 2, and August 9, 1996. At the August 2nd hearing, the following parties were represented: The debtor was represented by Lester L. Penterman, and by G. Gregory Eagleburger; ITNX and Alpha Business Group was represented by David W. Eagle; Keith Knowlton was also present, as an interested party. At the August 2nd hearing, the Court took the matter under advisement, in order to study the file and continued the matter to August 9, 1996.

At the August 9, 1996 hearing, the same attorneys were present, with the exception of Mr. Knowlton.

After consideration of the arguments made, and the state of the record, good cause appearing,

IT IS ORDERED overruling the objection ITNX and Alpha Business Group to the sale of the property, and authorizing an auction sale thereof. Said auction sale will be held on September 6, 1996 at 1:30 p.m. At that time, no further objections will be entertained, but only affirmative bidding will be received, resulting in a cash sale of the aforesaid real property.

IT IS FURTHER ORDERED that, once the property is sold, that any funds relating to that sale be impounded in an interest-bearing account, subject to further order of this Court;

IT IS FURTHER ORDERED that, once the sale has occurred, and funds are paid therefore, any person or entity claiming an interest in said funds shall make such claim by filing an adversary proceeding, commenced pursuant to *Bankr. R.* 7001, within 30 days of the date of the closing of the sale;

IT IS FURTHER ORDERED that if no complaining is filed, within the 30-day period following closing of the sale, then any interest of any party or entity claiming entitlement to the fund (other

than the debtor) including but not limited to ITNX and Alpha Business Group, shall be avoided and their interests shall be deemed extinguished;

IT IS FURTHER ORDERED that, with regard to any adversary proceeding commenced to determine the interest in the funds set forth above, that the Court will, upon the filing of an Answer, establish a trial scheduling order with a discovery cutoff, a dispositive motion cutoff, and will set a trial date. The Court may attend any or all depositions which may be scheduled in the case, and will require the parties to discuss with the Court the available times within which such depositions will be taken. Due to the apparent interwoven factual network of cases, adversary proceedings and judicial proceedings by and between the various persons associated with this debtor the Court anticipates that such depositions will include, but not be limited to, the following individuals:

Milton Pace

Milton Pace, Jr.

Andrew Spain

Carlton Hull (C. Hull)

Alpha Business Group's President

ITNX's President

The Court further notes that it may be helpful to also have a chain of title report prepared, by a credible title company in Colorado, for all parties' mutual assistance in determining the record of title ownership with regard to the subject real property.

Dated this 9th day of August, 1996.

s/James M. Marlar
JAMES M. MARLAR
UNITED STATES BANKRUPTCY JUDGE

Copy of the foregoing mailed
this 9th day of August, 1996, to:

United States Trustee
320 North Central, Suite 100
Phoenix, Arizona 85004

Keith Knowlton, Esq.
63 East Main Street, Suite 501
Mesa, AZ 85201-7417

Lester Penterman, Esq.
6040 East Thomas Road
Scottsdale, AZ 85251

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2999 N. 44th St., #600
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Sternberg & Eagle
80 E. Columbus
Phoenix, AZ 85012-2334

Deputy Clerk (jp)

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF ARIZONA

In re:	)	Chapter 11
	)	Case No. 85-3802-PHX-JMM
	)	ORDER CONFIRMING SALE
NORMA J. HURT fka	)	FREE AND CLEAR OF LIENS -
NORMA J. PACE,	)	LIENS TO ATTACH TO
	)	PROCEEDS
Debtor.)		(Tract 32, Block 42, Lots
	)	1,2,3,4,5 & 6, Creede, Mineral
	)	County, Colorado)
_____	)	

THIS MATTER coming on regularly before the Court upon the Debtor's Application for Sale of Real Property Free and Clear of Liens - Liens to Attach to Proceeds.

An objection to sale was filed by ITNX, a Nevada Corporation, and Alpha Business Group, Inc. on July 26, 1996, and said objection having come on for hearing and the Court being advised in the premises, entered its Order on August 9, 1996 overruling the objections, and setting the date for sale of the subject real property in open court to the highest bidder for September 6, 1996 at 1:30 P.M. on that date. Upon request, and without objection, the sale was continued to September 13, 1996 at 9:00 o'clock A.M.

On August 29, 1996 a Request for Evidentiary Hearing and Stay of Sale Real Property or Alternatively Postpone the Sale was filed by Milton G. Pace. The Court finds that this Request should be denied.

On September 13, 1996 the Court conducted the sale of the following described real property.

Tract 32, Block 42, Lots 1,2,3,4,5,6
Creede, Mineral County, Colorado

Mr. Jack Herweg, the original bidder, was present by telephonic appearance, and Mr. Gary Clark appeared as Trustee for Fidelity Title and Trust as the only bidders.

The Court advised the bidders that the sale was being made, as is, where is, no warranties or representations made by the estate. The Court further advised the bidders that the property would be conveyed without a warranty of title, and asked if the bidders were satisfied with title.

Mr. Clark, the successful bidder, stated that he understood the foregoing and agreed.

The Court accepted bids, and the highest and best bid was made by Gary Clark as Trustee for Fidelity Title and Trust, or its nominee, in the sum of Sixteen Thousand Dollars ($16,000.00).

The Court finds that this is the highest and best bid, and that it is for the best interests of the Debtor Estate to sell the subject property.

The Court asked Mr. Herweg if he desired to have his bid of $12,000.00 stand as a backup bid in the event Gary Clark did not consummate the sale. Based upon Mr. Herweg's affirmative response, his bid will be a backup bid.

IT IS ORDERED denying the objection filed by ITNX, a Nevada corporation, and Alpha Business Group, Inc., and the Motion filed by Milton G. Pace;

IT IS FURTHER ORDERED that the above-described real property be sold to the highest bidder Gary Clark as trustee for Fidelity Title and Trust, or its nominee, as is, where is, with no warranties or representations made by the estate, and without a warranty of title, for the sum of Sixteen Thousand Dollars

($16,000.00) cash, to be paid within thirty (30) days from date of this Order, and;

IT IS FURTHER ORDERED, in the event Gary Clark as Trustee for Fidelity Title and Trust does not consummate the sale then and in that event, the subject property will be sold to Jack Herweg or nominee for the sum of $12,000.00.

IT IS FURTHER ORDERED that the proceeds of sale shall be deposited in an interest bearing account until further Order of this Court, and;

IT IS FURTHER ORDERED that any person or entity claiming an interest in said funds, shall make such claim by filing an adversary proceeding, commenced within thirty (30) days of the date of the closing of the sale, and;

IT IS FURTHER ORDERED that if no Complaint is filed within the thirty (30) day period, then and in that event, any interest of any party or entity claiming entitlement to the funds (other than the Debtor) including but not limited to ITNX and Alpha Business Group, shall be avoided and the their interest shall be deemed extinguished.

Dated this____day of SEP 30 1996, 1996.

JAMES M. MARLAR

U.S. Bankruptcy Judge

NOT FOR PUBLICATION
UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re

NORMA J. HURT,	)BAP No. AZ-98-1532-) KPRv
Debtor.)	
ITNX,	)Bk. No. 85-03802-PHX-) JMM
Appellant,	))
	)MEMORANDUM[1]
v.	)
NORMA J. HURT,	)
Appellee.	)

Argued and Submitted on July 22, 1999
at Phoenix, Arizona

Filed - September 13, 1999

Appeal from the United States Bankruptcy Court
for the District of Arizona

Honorable James M. Marlar, Bankruptcy Judge, Presiding

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[1]This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except when relevant under the doctrines of law of the case, res judicata, or collateral estoppel. See 9th Cir. BAP Rule 13 and 9th Cir. Rule 36-3.

Before: KLEIN, PERRIS and RYAN, Bankruptcy Judges.

The bankruptcy court approved the debtor's application to sell real property free and clear of liens pursuant to § 363(f)(4),[2] finding that the interest in the property is in a bona fide dispute. ITNX appealed, claiming that it is the undisputed owner of the real property. We AFFIRM.

FACTS

This appeal is one of many that stems from the domestic dispute between appellee/debtor Norma Hurt ("Hurt") and Milton Pace ("Pace").[3] Hurt and Pace filed for divorce on January 4, 1977, and the final decree dissolving the marriage was entered on May 15, 1978.

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[2] Unless otherwise indicated, all chapter, section and rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330 and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9036.

[3] Although Hurt appears to allege that appellant ITNX, Inc. is a corporation controlled by Pace, the record is unclear as to Milton Pace's relationship with the appellant.

The subject of this appeal is a piece of real property located in Creede, Mineral County, Colorado ("the Colorado Property").

Appellant's contentions:

According to the appellant, ITNX, Inc. ("ITNX"), Pace acquired title to the Colorado property by patent from the State of Colorado in 1965, during his marriage to Hurt. ITNX contends that it is the sole fee title holder to the Colorado property based upon an uninterrupted chain of title. ITNX claims that title to the Colorado property was transferred from Pace to Robertson Wood Products on May 23, 1979, via a Sheriff's Deed. The Deed allegedly indicates that the Colorado property was conveyed by the Sheriff to Robertson Wood Products as a result of an execution sale. Robertson Wood Products, in turn, conveyed title of the Colorado property to ITNX on November 21, 1981. On June 30, 1989, ITNX executed a deed of trust conveying the Colorado property to Alpha Business Group.

Debtor's contentions:

Debtor Hurt, on the other hand, tells a different story. According to Hurt, the divorce court awarded her all right, title and interest to various real properties, including the Colorado property.

Thus, the Sheriff's Deed with which Robertson Wood Products acquired title to the property was void because Pace did not own the property at the time. Hurt asserts that she brought a successful action against Robertson Wood Products in the Arizona state court, which held that the levy and the subsequent sale of the Colorado property against Milton Pace was void as to Hurt.

On December 2, 1985, an involuntary chapter 11 petition was filed against Hurt, allegedly by Pace and his corporate entities.

Hurt filed an adversary complaint against Pace and several of his corporate entities and Robertson Wood Products with regard to the Colorado property. The judgment, entered on April 3 1990, provides that all of claimants' liens and encumbrances placed upon Hurt's real properties are declared null and void and that claimants are ordered to release all liens and encumbrances placed upon Hurt's real properties. Hurt claims that the judgment further provides that any transfer of the Colorado property in derogation of Hurt's rights was null and void. The Bankruptcy Appellate Panel and the Ninth Circuit affirmed the judgment.

Proceedings Below:

On June 24, 1996, the debtor sought authority from the bankruptcy court to sell the Colorado property free and clear of liens pursuant to § 363. Appellant ITNX and Alpha Business Group filed objections to the sale, and the debtor filed a response.

After conducting hearings on the matter, the bankruptcy court overruled the objections and entered an order authorizing an auction sale of the Colorado property. The order further provided that the proceeds from the sale shall be impounded in an interest-bearing account and that any entity claiming an interest in the sale proceeds shall make a claim by filing an adversary proceeding.

Subsequently, Pace filed a motion for evidentiary hearing and stay of sale of real property. The court denied the motion. This appeal ensued.

ISSUES

Whether the bankruptcy court erred in authorizing the debtor to sell the Colorado property free and clear of liens pursuant to § 363(f)(4) because said interest is in a bona fide dispute.

Whether the bankruptcy court erred in finding that the appellant is not a "co-owner" within the meaning of § 363 (h) and (i).

STANDARD OF REVIEW

We review the bankruptcy court's findings of fact for clear error and the court's conclusions of law de novo. Jodoin v. Samavoa (In re Jodoin), 209 B.R. 132, 135 (9th Cir. BAP 1997).

Whether a bona fide dispute exits is a question of fact reviewable under the clearly erroneous standard. See Austein v. Schwartz (In re Gerwer), 898 F.2d 730, 733 (9th Cir. 1990).

DISCUSSION

I.

Preliminarily, we note that the record of this appeal is inadequate. Indeed, the record is so sparse that we have no way of independently verifying the "facts" as asserted by the parties in their briefs.

Federal Rule of Bankruptcy Procedure 8006 requires that an appellant designate a record that includes both "any opinion, findings of fact, and conclusions of law of the court" and any transcript that will be needed. Fed. R. Bankr. P. 8006. These items are mandatory,

not optional. McCarthy v. Prince (In re McCarthy), 230 B.R. 414, 417 (9th Cir. BAP 1999). Similarly, Federal Rule of Bankruptcy Procedure 8009(b)(5) requires that in any appeal to a bankruptcy appellate panel there be an appendix of excerpts of the record that includes the "opinion, findings of fact, or conclusions of law filed or delivered orally" by the court. Fed. R. Banrk. P. 8009(b)(5). This is also mandatory, not optional. The appellant's appendix omits the findings and is, as a matter of law, incomplete. McCarthy, 230 B.R. at 417; Kritt v. Kritt (In re Kritt), 190 B.R. 382, 386 (9th Cir. BAP 1995); Burkhart v. FDIC (In re Burkhart), 84 B.R. 658, 661 (9th Cir. BAP 1988).

Appellant did not provide us with a copy of the transcript of the court's oral findings of fact and conclusions of law, even though appellant quotes from it in his opening brief. Without the transcript, we are unable to determine the reasoning for the trial court's action.

Furthermore, Federal Rule of Appellate Procedure 10(b)(2) provides that:

> If the appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, the appellant shall include in the record a transcript of all evidence relevant to such finding or conclusion.

Fed. R. App. P. 10(b)(2).

Our effort in reviewing this appeal has been hampered by the failure of both parties to provide us with those portions of the record wherein support for their respective positions is asserted to be found. Almost all of the factual assertions in the parties' briefs are unsupported by the record and, thus, we have no knowledge of whether the assertions made here were properly before the trial court. See Burkhart, 84 B.R. at 661.

Appellant should know that in order to reverse the trial court's finding of fact for clear error, the record must include the entire transcript and all other relevant evidence considered by the bankruptcy court. Id.; Kritt, 190 B.R. at 387; Friedman v. Sheila Plotsky Brokers, Inc. (In re Friedman), 126 B.R. 63, 68 (9th Cir. BAP 1991).

In this appeal, we are faced with a record on appeal that is so scant it makes review under the clearly erroneous standard difficult.

In the appellant's opening brief, he cites to the trial court's transcript, the debtor's application to sell property free and clear of liens, the original title to the Colorado property acquired by appellant from the state of Colorado, the judgment which declared appellant's liens and encumbrances against the Colorado property to be null and void, the alleged conveyance of title from Robertson Wood Products to ITNX, and last, but not least, the objection to sale filed by appellant. Yet, the appellant did not supply us with copies of any of these documents as part of the appellate record.[4]

The burden is on the appellant to provide an adequate record. McCarthy, 230 B.R. at 417; Kritt, 190 B.R. at 387. The appellant's failure to provide relevant portions of the record entitles us to dismiss this appeal. See McCarthy, 230 B.R. at 417; Syncom Capital Corp. v. Wade, 924 F.2d 167, 169 (9th Cir. 1991); Southwest

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[4] In light of the competing claims to the Colorado property, the bankruptcy court, in its Order Re: Application for Sale of Real Property, noted that it may be helpful to have a chain of title report prepared by a credible title company in Colorado. We cannot determine if the parties did submit a title report to the court, and assuming they did, the appellant did not include a copy of the title report in the record.

Admin'rs, Inc. v. Lopez, 781 F.2d 1378, 1378-80 (9th Cir. 1986). If we do not dismiss, we are entitled to presume that the appellant does not regard the record as helpful to his appeal. See Gionis v. Wayne (In re Gionis), 170 B.R. 675, 680-81 (9th Cir. BAP 1994), aff'd mem., 92 F.3d 1192 (9th Cir. 1996).

In this case, we will exercise our discretion to examine what little record we have been provided. In doing so, we may affirm for any basis fairly supported by the record. Foster v. Skinner, 70 F.3d 1084, 1087 (9th Cir. 1995).

II.

Section 363(f) of the Bankruptcy Code gives a debtor in possession[5] the authority to sell property of the debtor free and clear of liens under certain conditions. It provides in pertinent part:

> (f) The trustee may sell property . . . free and clear of any interest in such property of an entity other than the estate only if - -

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[5] Section 1107 of the Bankruptcy Code confers upon the debtor in possession all of the rights, powers, duties and limitations of a Chapter 11 trustee.

> (1) applicable nonbankruptcy law permits sale of such property free and clear of such interest;
> (2) such entity consents;
> (3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;
> (4) such interest is in a bona fide dispute; or
> (5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

11 U.S.C. § 363(f). Only one of the enumerated conditions need be met for the court to approve the proposed sale. In re Collins, 180 B.R. 447, 450 (Bankr. E.D. Vir. 1995). In this case, the parties agree that the bankruptcy court approved the sale based upon a finding of a "bona fide dispute."

Although the term "bona fide dispute" is not defined in § 363(f)(4), bankruptcy courts have examined the term in conjunction with § 303, which also utilizes the term in connection with the nature of claims asserted as a basis for involuntary Chapter 7 petitions. Collins, 180 B.R. at 452; In re Octagon Roofing, 123 B.R. 583, 590 (Bankr.N.D.Ill. 1991). The standard under § 303 requires the bankruptcy court to determine "whether there is an objective basis for either factual or legal dispute as to the validity of the debt."

Octagon Roofing, 123 B.R. at 590. A court need not resolve the dispute, but only determine its existence. Collins, 180 B.R. at 452.

In this case, a cursory reading of the briefs would indicate that the ownership of the Colorado property is clearly in dispute. In essence, the debtor asserts that she was awarded the property as part of her divorce and that any subsequent conveyances by Pace and other parties were null and void. ITNX contends that it properly acquired title to the property through a regular chain of title.

Unfortunately, ITNX did not supply us with a title report to support its claim. While the debtor claims that the Arizona judgment declared the Sheriff's levy and sale of the Colorado property void, ITNX arbitrarily dismissed the Arizona judgment as irrelevant. Indeed, ITNX claims that the Sheriff's Deed has never been challenged in any proceeding, but the debtor's action in the Arizona state court appears to do precisely that. Of course, without a copy of the Arizona judgment, we are unable to determine the validity of the Sheriff's Deed as it applies to the debtor.

Similarly, the one document that would have shed some light on the situation would be the April 30, 1990 judgment entered by the bankruptcy court. Unfortunately, the debtor and ITNX presented completely contradictory views of the judgment that are impossible to reconcile, and again, the record does not contain the judgment.

ITNX complains that the bankruptcy court gave credit to a number of "unproven allegations" asserted by the debtor while at the same time ignored the evidence presented by ITNX. ITNX did not specify what these unproven allegations were and what evidence it presented to the court. Indeed, we have no record of any of the evidence presented by both parties to the bankruptcy court.

Judging from the assertions contained in the briefs, there is a factual dispute as to the ownership of the Colorado property. It is a dispute that we cannot, and need not, resolve. An interest is in bona fide dispute if "the outcome of the dispute over the interest will affect the value of the estate . . . ." Gerwer, 898 F.2d at 733. The outcome of whether the debtor or ITNX owns the Colorado property will inevitably affect the value of the estate and, therefore, a bona fide dispute exits.

If anything, the parties' positions give credence to the fact that there is indeed a bona fide dispute as to the ownership of the Colorado property. As the record presently stands, the appellant has not supplied us with those portions of the record indicating the commission of clear error.

III.

Next, ITNX argues that he should enjoy the rights of a co-owner as specified in § 363(h)and (i), which, in pertinent part, provide:

> (h) Notwithstanding subsection (f) of this section, the trustee may sell both the estate's interest, under subsection (b) or (c) of this section, and the interest of any co-owner in property in which the debtor had, at the time of the commencement of the case, an undivided interest as a tenant in common, joint tenant, or tenant by the entirety, only if--
> (1) partition in kind of such property among the estate and such co-owners is impracticable;
> (2) sale of the estate's undivided interest in such property would realize significantly less for the estate than sale of such property free of the interests of such co-owners;
> (3) the benefit to the estate of a sale of such property free of the interests of co-owners outweighs the detriment, if any, to such co-owners; and
> (4) such property is not used in the production, transmission, or distribution, for sale, of electric

> energy or of natural or synthetic gas for heat, light, or power
> (i) Before the consummation of a sale of property to which subsection (g) or
> (h) of this section applies, . . . the debtor's spouse, or a co-owner of such property, as the case may be, may purchase such property at the price at which such sale is to be consummated .

11 U.S.C. § 363 (h) and (i).

Even though ITNX asserts that it is the sole owner of the property, it urges us to extend § 363 (h) and (i) to cover sole owners because it would be illogical to deny a sole owner the rights that are granted to a partial owner. In essence, ITNX contends that it should have the right to match the winning bid on the Colorado property, just as a co-owner would under § 363(i). ITNX does not cite to any authorities to support this proposition.

> Section 363 governs the rights of parties in liquidating the bankruptcy estate's fractional interest in property owned jointly by the bankruptcy estate and the nonbankrupt co-owners. Subsection (h) permits the trustee . . . to affect a forced sale of property in which the debtor and the other co-owners have an undivided interest. Subsection (i) permits a co-owner of the property to purchase it from the trustee at the same price as the trustee otherwise intended to sell it to the third party.

The plain language of subsections (h) and (i) refers to "co-owners". If Congress wanted the rights enumerated in subsections (h) and (i) to apply to sole owners, it would have said so. The fact that § 363(h) expressly specifies the co-owner interest to be "a tenant in common, joint tenant, or tenant by the entirety" reinforces Congress' intention to have this subsection apply to co-owners only. Indeed, Collier on Bankruptcy provides that the nature of the co-ownership must fall within the aforementioned categories in order for § 363(h) to apply.[6]

Furthermore, the general subject matter of § 363 is concerned with the estate's fractional interest in properties that are jointly owned by others. To extend the rights covered in § 363 (h)

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[6] Collier notes that "The legislative history says '[s]ubsection (h) permits sale of a co-owner's interest in property in which the debtor had an undivided interest *such as* a joint tenancy, tenancy in common or a tenancy by the entirety.' Nevertheless, because the words, 'such as' do not appear in section 363(h) itself, the section does not apply if the manner of holding property does not fall squarely within one of the three listed categories." LAWRENCE P. KING, 3 COLLIER ON BANKRUPTCY, ¶ 363.08[2] (15th ed. rev. 1999) (emphasis in original).

and (i) to sole owners would defeat the entire statutory scheme of § 363.

ITNX, at no time, contends that it is a co-owner of the Colorado property. It claims to be the sole owner and, thus, it is not entitled to match the winning bid pursuant to § 363(i). ITNX does not cite to any case law, treatise, or congressional record to support its proposition that rights granted to co-owners should be extended to sole owners. The plain language of the statute is clear. As a result, we decline to extend the rights covered in § 363(h) and (i) to sole owners.[7] Accordingly, the bankruptcy court did not err by refusing ITNX's request to match the winning bid to the Colorado property.

CONCLUSION

This appeal is plainly a morass. There is much more to this appeal than meets the eye and the bankruptcy court is in a better position to judge the facts. Given the scant record in this appeal, we

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[7] In its opening brief, ITNX contends that Federal Rule of Bankruptcy Procedure 7001 requires an adversary proceeding for an action brought under § 363(h). Since we conclude that § 363(h) is inapplicable to ITNX, this argument is not relevant.

conclude that the bankruptcy court's finding of a bona fide dispute as to the ownership of the Colorado property is not in clear error. The bankruptcy court properly approved the sale of the Colorado property pursuant to § 363(f)(4). Order AFFIRMED.

Filed
Jun 05 2001
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In re: NORMA J. HURT, No. 00-15088

Debtor. BAP No. AZ-98-01532-KPRy

ITNX, MEMORANDUM*********

Appellant,

v.

ALPHA BUSINESS GROUP, INC.;

********* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by 9th Cir. R. 36-3.

NORMA J. HURT,

Appellees.

Appeal from the Ninth Circuit

Bankruptcy Appellate Panel

Klein, Perris and Ryan, Judges, Presiding

Argued and Submitted May 15, 2001

San Francisco, California

Before: HUG and T.G. NELSON, Circuit Judges, and SHADUR,********* District Judge.

********* Honorable Milton I. Shadur, Senior United States District Judge for the Northern District of Illinois, sitting by designation.

1. The first question presented is whether the bankruptcy court erred in allowing the sale of the Colorado property. Although the bankruptcy court allowed the sale under 11 U.S.C. § 363(f)(4), which ITNX challenges, we find that the sale was proper under 11 U.S.C. § 363(b) and affirm. 11 U.S.C. § 363(b) allows the debtor in possession[1] to sell, other than in the ordinary course of business, "property of the estate." "Property of the estate" is defined as, among other things, "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a)(1). Accordingly, if the Colorado property was property of the estate, it was within the bankruptcy court's power to allow the sale.

The settlement agreement and subsequent judgment in adversary proceeding 87-199 establish that title in the Colorado property was quieted in favor of Hurt. The settlement agreement provided for the "[w]aiver and release of . . . any claim by Andrew B. Spain or any of his entities in and to the real property in

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[1] Although 11 U.S.C. § 363(b) speaks in terms of the "trustee," 11 U.S.C. § 1107 confers upon debtors in possession all the rights, powers, and duties of a Chapter 11 Trustee.

Colorado." As president of ITNX, Spain thus waived ITNX's claim to the Colorado property. The judgment in adversary proceeding 87-199 confirms as much, providing, "The property listed on the exhibit tendered with the settlement agreement . . . shall be confirmed in Norma J. Hurt as her sole and separate property . . . ." The Colorado property was correctly identified in the exhibit. Accordingly, the Colorado property was property of the estate, the sale of which the bankruptcy court was empowered to allow.

2. As the bankruptcy court correctly ruled, ITNX was not entitled under 11 U.S.C. § 363(i) to match the high bid on the property. That provision provides:

> Before the consummation of a sale of property to which subsection (g) or (h) of this section applies . . . a co-owner of such property . . . may purchase such property at the price at which such sale is to be consummated.

11 U.S.C. § 363(i). Subsection (g) is inapplicable, for it applies to "any vested or contingent right in the nature of the dower or curtesy." 11 U.S.C. § 363(g). And subsection (h) apples to "the interest of any co-owner in property in which the debtor had, at the time of the commencement of the case, an undivided interest as tenant in

common, joint tenant, or tenant by the entirety." 11 U.S.C. § 363(h). This, too, is inapplicable. ITNX is not a co-owner with Hurt sharing an undivided interest as joint tenant, tenant in common, or tenant by the entirety. It is a third party that itself claims to be sole owner. Accordingly, ITNX had no right to match the high bid.

3. Although argued by ITNX, we need not determine whether the bankruptcy court had the power to itself "determine" an adversary proceeding to resolve who owned the property, because Hurt owned the property as a matter of law due to the settlement and judgment in adversary proceeding 87-199. There was no need for an adversary proceeding in 1996 as to ownership, and none in fact occurred. Accordingly, the bankruptcy court did not exceed its powers under 28 U.S.C. § 157 because it did not purport to resolve the ownership dispute by conducting and deciding an adversary proceeding.

4. Similarly, although also argued by INTX, we need not decide whether a bona fide dispute existed under 11 U.S.C. § 363(f)(4). Sale of the Colorado property was proper under 11 U.S.C. § 363(b) because the property was, as a matter of law, property of the

estate by virtue of the settlement and judgment in adversary proceeding 87-199. Accordingly, there was no need to resort to § 363(f)(4).

AFFIRMED.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
Jun 20 2001
Cathy A. Catterson, Clerk
United States Court of Appeals

In re: NORMA HURT,

Debtor.

No. 00-15088

BAP No.
AZ-98-01532-
KPRy

ITNX,

Appellant,

ORDER

v.

ALPHA BUSINESS GROUP, INC.;
NORMA J. HURT,

Appellees.

Before: HUG, Circuit Judge.

The motion for extension of time to file petition for rehearing with suggestion for rehearing en banc is GRANTED.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
Aug - 3 2001
Cathy A. Catterson, Clerk
U.S. Court of Appeals

In re: NORMA J. HURT,
Debtor.

No. 00-15088
BAP No. AZ-98-01532-KPRy

ITNX,
Appellant,

v.

ALPHA BUSINESS GROUP, INC.;
NORMA J. HURT,
Appellees.

ORDER

Before: HUG and T.G. NELSON, Circuit Judges, and SHADUR,* District Judge.

The panel has voted to deny the petition for rehearing. Judges Hug and Nelson vote to deny the suggestion for rehearing en banc and Judge Shadur so recommends.

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* Honorable Milton I. Shadur, Senior United States District Judge for the Northern District of Illinois, sitting by designation.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35 (b).

The petition for rehearing and suggestion for rehearing en banc are denied.